

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

**GREEN PLANET LANDSCAPING,
INC.,**

Respondent.

Case No. 94-00

FINDINGS OF FACT
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ORDER

SYNOPSIS

Respondent failed to return BOLI's 1999 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a \$500.00 civil penalty for this violation of ORS 279.359(2). The Agency did not meet its burden of proving that Respondent committed a second violation of ORS 279.359(2) by failing to return the 1998 prevailing wage rate survey because the Agency did not prove by a preponderance of the evidence that Respondent received that survey. ORS 279.359, ORS 279.370, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 6, 2000, in the conference room of the Oregon State Employment Department, 1100 East Marina Way, Suite 121, Hood River, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by its authorized representative, Guy Bowie, who is Respondent's secretary.

The Agency called no witnesses, relying solely on documentary evidence. Respondent introduced no evidence into the record.

The forum received into evidence:

- a) Administrative exhibits X-1 to X-4 (generated or filed prior to hearing).
- b) Agency exhibits A-1 to A-2 (submitted prior to hearing with the Agency's case summary).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 20, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 1998 Construction Industry Occupational Wage Survey (“1998 survey”) within two weeks as required by the commissioner. The Agency also alleged that Respondent unlawfully failed to complete and return the 1999 Construction Industry Occupational Wage Survey (“1999 survey”) by September 15, 1999. The Agency sought a civil penalty of \$500.00 for each of these two alleged violations of ORS 279.359(2).

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if it wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent’s registered agent, Guy Bowie, on or about January 25, 2000.

4) On or about February 6, 2000, Guy Bowie, Respondent’s “owner,” sent the Agency a letter authorizing himself to represent Respondent in this proceeding. Respondent also requested a hearing.

5) On February 17, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default, stating that it would issue a Final Order by Default if it did not receive an answer and request for hearing from Respondent by February 28, 2000.

6) On February 24, 2000, the Agency received a letter from Respondent asserting that it never had received the wage surveys. Respondent again requested a hearing.

7) On March 15, 2000, the Agency moved to amend the Notice of Intent to reflect that it was seeking a civil penalty of \$1000.00 for Respondent's alleged failure to return the 1999 survey, bringing the total penalties sought to \$1500.00. The Agency withdrew that motion on April 5, 2000.

8) The Agency filed a request for hearing with the Hearings Unit on March 15, 2000, and served it on Respondent.

9) On May 2, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for July 6, 2000; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

10) On May 23, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 22, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

11) The Agency filed a timely case summary on June 22, 2000. Respondent did not file a case summary despite the fact that its authorized representative received the case summary order.

12) At the start of the hearing, the ALJ confirmed that Respondent's authorized representative had received the Summary of Contested Case Rights.

13) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) At the start of the hearing, the participants stipulated to the following facts:

a) Respondent is an employer in the construction industry.

b) The Commissioner, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey 1998 to collect data for use in determining the prevailing rates of wage for workers in trades or occupations in the localities designated in ORS 279.348. This 1998 survey included forms that the survey recipients were required to complete and return within two weeks of their receipt.

c) Respondent never completed nor returned the 1998 survey.

d) The Commissioner, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey 1999 to collect data for use in determining the prevailing rates of wage for workers in trades or occupations in the localities designated in ORS 279.348. This 1999 survey included forms that the survey recipients were required to complete and return by September 15, 1999.

e) Respondent never completed nor returned the 1999 survey.

15) During the hearing, Respondent sought to introduce testimony of its secretary, Guy Bowie. The Agency objected to that testimony on the grounds that Respondent had not filed a case summary, that the Agency did not know that Bowie had knowledge of any facts relevant to the case, and that the Agency, therefore, would be prejudiced if Bowie were allowed to testify to facts that the Agency would not be prepared to rebut. The ALJ sustained the Agency's objection and did not allow Bowie to testify.

16) The ALJ issued a proposed order on July 11, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

17) On July 12, 2000, the Agency filed exceptions to the proposed order. The Agency excepted to the ALJ's conclusion that the Agency had not proven, by a preponderance of the evidence, that Respondent had received the 1998 wage survey. The Agency's exceptions are addressed in the rewritten Opinion section of this Final Order under the heading "The 1998 Wage Survey." For the reasons stated in that section, the Agency's exceptions are overruled.

FINDINGS OF FACT – THE MERITS

1) Since 1996, Respondent has been an Oregon corporation engaged in landscape and horticultural services. Respondent employs workers in the construction industry. Respondent has been based in Hood River, Oregon, since at least 1999.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct a Construction Industry Occupational Wage Survey ("wage survey"). The BOLI Commissioner planned to, and did, use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) On or about September 15, 1998, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The letter accompanying the survey stated in bold print that the survey had to be returned within two weeks and that failure to return a completed survey form could result in a monetary fine.

4) The Employment Department never received a 1998 wage survey from Respondent.

5) The Employment Department sent the 1998 wage survey packet discussed above to Respondent at 2751 Webster Rd, Hood River, OR 97031 ("the Webster Road address"). The Webster Road address is not Respondent's current address. No evidence in the record explains why the Employment Department

associated the Webster Road address with Respondent. The only evidence in the record linking Respondent to that address is the following statement in the affidavit of Mary Wood, a research analyst with the Employment Department:

“A preliminary 1999 survey postcard was sent to Respondent at 2751 Webster Rd. The postcard was received back from Respondent. It indicated they had a new address of 2763 Odell Hwy, Hood River, OR 97031 [“the Odell Highway address”]. Based on the information Respondent supplied on this postcard, they were included in the 1999 wage survey.”

This assertion is sufficient to establish that Respondent, by some unknown means, came into possession of a postcard that had been mailed to it at the Webster Road address, presumably sometime in mid-1999.ⁱ The statement, however, is not sufficient to establish by a preponderance of the evidence that the Webster Road address was Respondent’s correct address in 1998, when the 1998 wage survey materials were mailed, particularly in the face of Respondent’s assertion that it did not receive the survey. The Agency did not meet its burden of proving that Respondent received the 1998 wage survey.

6) On or about August 16, 1999, a copy of the 1999 wage survey packet was sent to Respondent by first-class mail at the Odell Highway address. The Odell Highway address was Respondent’s correct address as of February 2000 and throughout this contested case hearing process. Because Respondent informed the Employment Department sometime before the 1999 wage survey was sent out that its address was 2763 Odell Highway, the forum infers that the Odell Highway address was Respondent’s correct address at all subsequent points in time.

7) The 1999 wage survey packet sent to Respondent included a postage paid envelope for return of the survey. The phrase "FILING DEADLINE: September 15, 1999" was displayed prominently on the front of the survey form. A letter included with

the survey form notified contractors that "[f]ailure to return a completed survey form [might] result in a monetary fine."

8) On or about August 18, 1999, a form letter was sent to Respondent by first-class mail at the Odell Highway address providing additional information needed for completion of the wage survey form.

9) Respondent did not return the 1999 wage survey by the September 15, 1999, deadline. On or about September 20, 1999, a "Survey Past Due" card was sent by first-class mail to Respondent at the Odell Highway address. A second "Survey Past Due" card was sent to Respondent at the same address on October 18, 1999, this time with "Final Notice" stamped on it.

10) None of the mail sent to Respondent at either the Webster Road address or the Odell Highway address was returned to the Employment Department, either as "undeliverable" or for any other reason.

11) The forum infers from the facts discussed in Findings of Fact – the Merits 6 through 10 that Respondent did receive the 1999 wage survey packet.

12) Respondent never returned the 1999 wage survey to the Employment Department.

13) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 1998 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) The Agency did not meet its burden of proving that Respondent received the commissioner's 1998 wage survey.

4) The commissioner conducted another wage survey in 1999 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

5) Respondent received the commissioner's 1999 wage survey.

6) Respondent failed to return a completed 1999 survey by September 15, 1999, the date specified by the commissioner.

7) There is no evidence in the record that Respondent committed previous violations of the prevailing wage rate laws.

8) Respondent could easily have returned the 1999 survey by September 15, 1999, and knew or should have known of its failure to do so.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"* * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2).

Respondent's failure to return a completed 1999 wage survey by September 15, 1999, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"* * * * *

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * * * *

“(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.”

The commissioner has exercised his discretion appropriately by imposing a \$500.00 civil penalty for Respondent's single violation of ORS 279.359(2).

OPINION

To prove a violation of ORS 279.359(2), the Agency must show that:

- (1) Respondent is a “person;”
- (2) The commissioner conducted a survey that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;
- (3) Respondent received the commissioner's survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

The first, second, and fourth elements are not contested in this case, as Respondent concedes that it did not return either the 1998 wage survey or the 1999 wage survey. The only question is whether Respondent received those surveys so it would be in a position to complete and return them.

THE 1998 WAGE SURVEY

The Employment Department mailed the 1998 survey to Respondent at 2751 Webster Road, Hood River, Oregon. However, nothing in the record explains how the Employment Department determined that 2751 Webster Road was Respondent's correct address. The Agency argues that three facts, taken together, create an inference that Respondent received the 1998 survey, and that this inference establishes the third element of the Agency's case by a preponderance of the evidence. First, the 1998 wage survey was not returned to the Employment Department, either as undeliverable or for any other reasons. This establishes that mail was received by the addressee, but does not establish that 2751 Webster Road was Respondent's correct

address. Second, the forum infers from Respondent's return of the preliminary postcard sent to 2751 Webster Road in mid-1999, on which Respondent wrote that its new address was 2763 Odell Highway, that Respondent came into possession of that postcard by some means. Third, Respondent received the 1999 survey but denied this fact in the Answer, casting doubt on the credibility of Respondent's denial that it received the 1998 survey.

It is possible to infer from these circumstances, as the Agency argues in its exceptions, that Respondent's correct address in 1998 was 2751 Webster Road, and that Respondent received the 1998 wage survey form. However, the evidence in the record is not sufficient to support this inference.ⁱⁱ Under the circumstances, the forum declines to draw the inference sought by the Agency and concludes that the Agency has failed to prove, by a preponderance of the evidence, that Respondent received the 1998 wage survey.

THE 1999 WAGE SURVEY

The Agency did prove that Respondent received and failed to return the 1999 wage survey. Before that survey was mailed out, Respondent had informed the Employment Department that its correct address was on the Odell Highway, and that address remained Respondent's correct address through the time of hearing. The Employment Department mailed the 1999 wage survey and follow-up reminders to Respondent at the correct Odell Highway address. None of those documents was ever returned to the Employment Department as "undeliverable" or for any other reason. From these facts, the forum infers that Respondent received the 1999 wage survey, which Respondent concedes it never returned. The Agency proved that Respondent violated ORS 279.359(2) by failing to return the 1999 wage survey by the deadline set by the commissioner.

The commissioner may impose a penalty of up to \$5000.00 for Respondent's single proven violation of ORS 279.359(2). In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent previously has violated the prevailing wage rate laws. Second, although the accuracy of the Agency's prevailing wage rate determinations depends on receiving completed surveys from all contractors, Respondent's violation is not as serious as violations like failure to pay or post the prevailing rate of wage. On the other hand, it would have been relatively easy for Respondent to comply with the law by returning the 1999 wage survey, and the Agency gave Respondent at least two warnings before issuing the Notice of Intent. Under these circumstances, the forum finds that the \$500.00 penalty proposed by the Agency is appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **GREEN PLANET LANDSCAPING, INC.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS (\$500.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

ⁱ The 1999 wage surveys were mailed on or about August 16, 1999, and it is fair to assume that the preliminary postcards were sent shortly before then. (Exhibit A-2 at 2)

ⁱⁱ Among the ways this inference could have been supported are: (1) A statement from Wood explaining why the Employment Department believed 2751 Webster Road was Respondent's correct address at the time of the mailing; (2) Other documents, such as contractor registration forms or Corporation Division

records showing that 2751 Webster Road was Respondent's address at the time of the mailing; (3) A statement by a Respondent representative, either directly from that person or made to an Agency investigator, as to Respondent's address at the time of the mailing; (4) Respondent's 1998 business records on which Respondent's address was imprinted; these could have been obtained through discovery since Respondent's 1998 address was an issue.